

STATE OF MICHIGAN
COURT OF APPEALS

LLAMAS GROUP,

Plaintiff/Counter-Defendant-
Appellant,

v

HURON VALLEY SCHOOLS,

Defendant/Counter-Plaintiff/Cross-
Defendant/Third-Party Plaintiff-
Appellee,

and

BARTON MALOW COMPANY and
FANNING/HOWEY ASSOCIATES, INC.,

Defendants-Appellees,

and

LECOLE PLANNERS, L.L.C.,

Defendant/Cross-Plaintiff-Appellee,

and

HANOVER INSURANCE COMPANY,

Third-Party Defendant.

UNPUBLISHED

August 12, 2008

No. 275933

Oakland Circuit Court

LC No. 2004-062796-CK

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff The Llamas Group (TLG) appeals as of right from a judgment awarding it damages of \$139,556.45 against defendant Huron Valley Schools, following a jury trial.¹ On appeal, plaintiff challenges the trial court's decision to preclude it from presenting evidence of consequential damages in this breach of contract action. We reverse and remand.

Initially, we find it unnecessary to consider plaintiff's argument that defendant's motion to preclude evidence of consequential damages was in reality an improper, untimely, and unsupported motion for summary disposition, and therefore, should not have been considered in the first instance. Regardless of whether the motion is characterized as a motion for summary disposition, or a motion in limine, we agree that the trial court erred by precluding plaintiff from presenting evidence of consequential damages.²

A trial court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion, but preliminary issues of law are reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

In *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 6; 516 NW2d 43 (1994), our Supreme Court, quoting *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980), observed that Michigan follows the damages rule of *Hadley v Baxendale*, 9 Exch 341, 156 Eng Rep 145 (1854),³ which states that

damages recoverable for breach of contract are those that arise naturally from the breach or those that were in contemplation of the parties at the time the contract was made.

The *Lawrence* Court concluded that review of Michigan law “reveal[ed] a flexible approach when determining the foreseeability of contract damages” and that the “[d]efendants’ assertion that Michigan applies the objective standard of foreseeability is consistent with this flexible approach.” *Lawrence, supra* at 12. Objective foreseeability tests what a party knows or has reason to know. *Id.* at 13. The Court commented that “[t]he *Hadley* rule, as stated in *Kewin*, . . . requir[es] only that ‘[t]he damages recoverable are those damages that arise naturally from the breach, or which can *reasonably* be said to have been in contemplation of the parties at the time the contract was made.’” *Id.* (emphasis in original).

¹ The remaining defendants are not parties to this appeal.

² We reject defendant's argument that plaintiff's written offer of proof may not be considered because it is not part of the trial court record. MRE 103(a)(2) requires a party to make an offer of proof in order to preserve an issue concerning the exclusion of evidence. Here, the trial court informed plaintiff on the record that it could submit a written offer of proof.

³ While *Kewin* involved a claim for mental distress damages, the Supreme Court applied the *Hadley* test to determine whether the requested damages were recoverable, but concluded that there was no evidence that such damages arose naturally from the breach or were within the contemplation of the parties when the contract was made. *Kewin, supra* at 418-419.

The *Lawrence* Court concluded that the plaintiff had established a prima facie case of lost profits by showing that the defendant insurer knew that the insured vehicle was used for commercial purposes, to make profits, and knew that the loss of the vehicle would result in lost profits (unless the truck was replaced). *Id.* at 13-14. Further, insuring trucks was a primary source of the defendant's business, and many of the defendant's clients were one-truck owners, who would suffer lost profits if deprived of their trucks, which were their only source of income. *Id.* at 14. This evidence, combined with the nature of the underlying transaction, was sufficient to allow a jury to infer that the defendant knew or should have known that the plaintiff would lose profits if the defendants breached the insurance contract. *Id.* at 14-16.

In *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989), this Court reiterated that "the appropriate measure of damages for breach of contract . . . is that which would place the injured party in as good a position as it would have been in had the promised performance been rendered." See also *Body Rustproofing, Inc v Michigan Bell Tel Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986). "Under this principle, lost profits, if they arise from the breach and are properly proved, are an appropriate element of damages." *Jim-Bob, supra* at 98; see also *Body Rustproofing, supra* at 390. Lost profits must be proven with a reasonable degree of certainty, considering the nature of the case. *Body Rustproofing, supra* at 390-391. However, mathematical precision is not required. *Jim-Bob, supra* at 98-99.

In *Tempo, Inc v Rapid Electric Sales & Service, Inc*, 132 Mich App 93, 96-97; 347 NW2d 728 (1984), the defendant filed mechanic's liens on a project due to the plaintiff general contractor's failure to pay for the defendant's work. The plaintiff and the owner sued the defendant to invalidate the liens, and the defendant counterclaimed for damages. *Id.* at 97. The defendant prevailed and was awarded damages, including lost profits, due to loss of bonding. *Id.* at 97, 102-103. The defendant estimated his lost profits by "determining which jobs he would have bid on during that period had he had bonding, and estimating that he would have been awarded contracts on one out of every three to four jobs bid, with a profit margin of 3 percent." *Id.* at 103. This Court found that the defendant's "evidence [was] sufficient to warrant an award of damages for lost profits." *Id.* The Court concluded that "[w]hile perhaps to some degree speculative, this method of calculating lost profits had a reasonable degree of certainty and was not based solely on conjecture and speculation." *Id.* In responding to the plaintiff's causation argument, the Court stated that there was enough evidence "for the jury to conclude that these damages were the natural and proximate result of [the plaintiff's] breach," adding that the "[p]laintiffs were free to present their own evidence and to argue that other factors were in fact the cause of these damages." *Id.*

In the present case, plaintiff submitted an offer of proof that included supporting documentary exhibits. Although plaintiff did not submit any depositions or affidavits, under MRE 104(a), the rules of evidence do not apply when determining preliminary questions of admissibility, such as foundation.

According to plaintiff's offer of proof, its president, Julie Llamas, and its certified public accountant, Ray Nault, would have testified that as a result of defendant's breach of contract and improper claim on the bond, plaintiff was unable to pay its suppliers and lost its bonding ability. Being unbondable, plaintiff became unable to bid on public sector jobs, which had been a majority of its work.

Llamas also would have testified to the amount of public sector work that plaintiff normally did, plaintiff's process for finding work, and the jobs that plaintiff would have bid on, but for the loss of its bonding ability. She would have testified concerning plaintiff's historical success rate, which would allow plaintiff to identify how many jobs it lost. Nault would have provided testimony regarding plaintiff's projected growth, based on its continued bonding ability. Further, Nault had reviewed information provided by Llamas and calculated plaintiff's lost profits at \$1,126,461. Evidence consisting of a list of the jobs that plaintiff could have bid on, with their contract prices, plaintiff's historical ten percent success rate, and plaintiff's twenty percent profit margin was also submitted.

Plaintiff argued below that its loss of bonding capacity was an appropriate element of consequential damages, and that, as a public entity whose contractors must be bonded, defendant knew or should have known at the time the contract was made that if it committed a breach of contract that resulted in a loss of plaintiff's bonding capacity, plaintiff would suffer a loss of profits.

Plaintiff also submitted a letter from its bonding agent that stated that the loss of its bonding capacity was "due to uncertainties surrounding the Milford & Lakeland School project," which were the subject of plaintiff's contract with defendant. In addition, plaintiff submitted tax returns and financial statements with its offer of proof.

We believe that plaintiff presented sufficient evidence to allow a reasonable trier of fact to find that, given defendant's status as a public entity whose contractors must be bonded, defendant knew or should have known at the time the contract was made that making an improper claim against plaintiff's bond could affect plaintiff's bonding ability, resulting in lost profits. Accordingly, there was a sufficient foundation for plaintiff to introduce at trial evidence of consequential damages, including lost profits through loss of bonding. Thus, the trial court erred in precluding plaintiff from presenting evidence of its consequential damages at trial.

We do not agree with plaintiff's suggestion that this Court properly may enter an immediate award of consequential damages. While plaintiff has shown a sufficient foundation to introduce evidence of consequential damages, and the jury found that defendant breached its contract with plaintiff, factual issues remain. For example, although the jury found that both parties were in breach of contract, there is a question whether defendant's initial claim against the bond was nonetheless improper. Defendant may be able to present evidence that its breach did not cause plaintiff's loss of bonding capacity. Factual issues relating to plaintiff's historical success rate, its profit margin, and its expected growth rates may also affect whether a jury awards consequential damages, and if so in what amount. Therefore, remand for trial on the limited issue of consequential damages is necessary.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Kurtis T. Wilder